(4)

No. 01-1573

Supreme Court U.S.
FILED
JUL 12 2002
OFFICE OF THE CLERK

In The
Supreme Court of the United States

DAVID W. OAKLEY,

Petitioner,

STATE OF WISCONSIN,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Wisconsin

BRIEF OF NOW LEGAL DEFENSE AND EDUCATION FUND; NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES; NATIONAL ADVOCATES FOR PREGNANT WOMEN; PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.; CENTER FOR REPRODUCTIVE LAW & POLICY, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

LAWRENCE S. LUSTBERG
Counsel of Record
RISA E. KAUFMAN
GIBBONS, DEL DEO, DOLAN, GRIFFINGER & VECCHIONE
One Riverfront Plaza
Newark, New Jersey 07102
(973) 596-4500

MARTHA F. DAVIS
ILIZABETH GONCHAR HEMPSTEAD
NOW LEGAL DEFENSE AND EDUCATION FUND
395 Hudson Street, 5th Floor
New York, New York 10014
(212) 925-6635

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTERESTS OF AMICI CURIAE	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. THE WISCONSIN SUPREME COURT'S DECISION CONCERNS THE IMPORTANT FEDERAL QUESTION OF A STATE'S ABILITY TO INTERFERE WITH THE FUNDAMENTAL RIGHT TO PROCREATE	3
A. This Court Has Long-Recognized That The Right To Privacy, Specifically The Right To Procreate, Warrants Constitutional Protection From Undue Governmental Intrusion	3
B. The Challenged Probation Condition Significantly Infringes On The Right To Make Procreative Decisions Free From Government Control	4
II. THE WISCONSIN SUPREME COURT'S DECISION UPHOLDING THE CHALLENGED PROBATION PROVISION ON THE BASIS THAT IT IS BOTH REASONABLY RELATED TO A LEGITIMATE INTEREST AND IS NARROWLY TAILORED TO ACHIEVE A COMPELLING INTEREST CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT	9

TABLE OF CONTENTS – Continued

Page

A. Because The Probation Condition Imposes A Significant Infringement On The Right To Procreate, The Wisconsin Supreme Court Erred In Requiring The Condition To Pass Only Rational Basis Review 10

B. The No-Procreation Condition Is Not Narrowly Tailored To Serve A Compelling Interest 11

III. THE WISCONSIN SUPREME COURT'S DECISION WILL HAVE WIDE IMPACT ON THE FUNDAMENTAL PRIVACY RIGHTS OF VULNERABLE POPULATIONS AND MAY ENCOURAGE OPPROBRIOUS POPULATION CONTROL 13

CONCLUSION 20

APPENDIX A:

STATEMENTS OF INTEREST OF INDIVIDUAL *AMICUS CURIAE* ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Bearden v. Georgia,
461 U.S. 660 (1983) 6, 12

Buck v. Bell,
274 U.S. 200 (1927) 17, 18, 19

Carey v. Population Servs., Int'l,
431 U.S. 678 (1977) 3, 4, 10

Danforth v. Planned Parenthood of Central Missouri,
428 U.S. 52 (1976) 5

Eisenstadt v. Baird,
405 U.S. 438 (1972) 3, 4

Griswold v. Connecticut,
381 U.S. 479 (1965) 4

Little v. Streater,
452 U.S. 1 (1981) 6

People v. Pointer,
199 Cal. Rptr. 357 (Cal. App. 1984) 6

Pierce v. Society of Sisters,
268 U.S. 510 (1925) 17

Planned Parenthood of Southeastern Pennsylvania v. Casey,
505 U.S. 833 (1992) ..... *passim*

Powers v. Ohio,
499 U.S. 400 (1991) 17

Skinner v. State of Oklahoma,
316 U.S. 535 (1942) ..... *passim*

State v. Mosburg,
768 P.2d 313 (Kan. App. 1989) 6

TABLE OF AUTHORITIES – Continued

Page

State v. Oakley,
629 N.W. 2d 200 (Wis. 2001) ..... *passim*

Troxel v. Granville,
530 U.S. 57 (2000) 8

United States v. Knights,
534 U.S. 112 (2001) 10

United States v. Smith,
972 F.2d. 960 (8th Cir. 1992) 12

Zablocki v. Redhail,
434 U.S. 374 (1978) 7, 8, 11, 12

STATUTES

42 U.S.C. §654 (2002) 13

Wisc. Stat. Ann. §49.19(4)(h)1.a. (2001) 13

Wisc. Stat. Ann. §108.13(4)(c) (2001) 12

Wisc. Stat. Ann. §49.227 (2001) 12

Wisc. Stat. Ann. §49.854 (2001) 12

Wisc. Stat. Ann. §767.265 (2001) 12

Wisc. Stat. Ann. §767.303 (2001) 12

OTHER AUTHORITIES

Brandheim-Thoman Ctr. for Research on Child Wellbeing, *Dispelling Myths About Unmarried Fathers*, Fragile Families Research Brief (May 2000) 17

Elaine Sorensen & Helen Oliver, *Policy Reforms are Needed to Increase Child Support from Poor Fathers*, The Urban Inst. (Apr. 2002) 14

TABLE OF AUTHORITIES – Continued

Page

Elaine Sorensen, The Urban Institute, *Child Support and Fatherhood Proposals: Testimony before the United States House of Representatives, Subcommittee on Human Resources, Committee on Ways and Means* (June 28, 2001) 15

Helen Rodrigues-Triaz, *Sterilization Abuse, in Biological Woman – The Convenient Myth* (Ruth Hubbard *et al.* eds. 1982) 19

Michael Ollove, *The Lessons of Lynchberg*, The Baltimore Sun, May 6, 2001 ..... 18, 19

Michelle Ganow Jones, *Child Support Issues in Welfare Reform Reauthorization*, TANF Reauthorization Resources, The Welfare Info. Network (May 2002) 14

Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U.L. Rev. 30 (1985) 18

Rosalind Pollack Petchesky, *Abortion and Woman's Choice* (1984) 19

Sara McLanahan, *et al.*, The Brookings Institution, *Fragile Families, Welfare Reform, and Marriage*, Policy Brief No. 10 (Nov. 2001) 17

Stephen J. Gould, *The Flamingo's Smile* (1985) 18, 19

Tamar Nordenberg, U.S. Food and Drug Admin., *Protecting Against Unintended Pregnancy: A Guide to Contraceptive Choices* (June 2000) 7

TABLE OF AUTHORITIES – Continued

Page

U.S. Dep't of Justice, *Nat'l Correctional Population Reaches New High, Grows by 126,400 during 2000 to Total 6.5 Million Adults* (Aug. 26, 2001).....16

William Branigin, *Va. Apologizes to the Victims of Sterilizations*, Wash. Post, May 3, 2002 18

INTERESTS OF *AMICI CURIAE*[1]

Amici are leading national women's rights, social justice, and reproductive choice organizations that have a long history of working to protect reproductive freedom for men and women of all economic means, through advocacy, litigation and research. *Amici* are interested in this case because of the threat posed by the state court's decision to the critical privacy protections that this Court has consistently upheld, and because of the particularly harsh impact the decision may have on the procreative rights of low-income individuals and individuals seeking to emerge from the criminal justice system.

STATEMENT OF THE CASE

Amici curiae rely on the Statement of the Case submitted by Petitioner David W. Oakley.

SUMMARY OF ARGUMENT

Amici respectfully urge this Court to grant a *writ of certiorari* because of the important federal question raised by this case, namely the state's ability to impose a condition on probation which explicitly interferes with the right

[1] The Parties have consented to the filing of this brief.

Amici curiae state, pursuant to Sup. Ct. R. 37.6, that this brief was not authored in any part by counsel for any party. No person or entity, other than *amici* and their counsel, made a monetary contribution to the submission of this brief.

Individual statements of interest for each *amicus* are set forth in Appendix A.

to procreate, and decided by the state court in conflict with this Court's privacy jurisprudence. The state court decision upholding the provision, which prohibits Petitioner from having any additional children, unless and until he first proves to the court's satisfaction that he will support his previous children and any newborn children, significantly jeopardizes the privacy and procreation rights of individuals, particular those in vulnerable populations, and conflicts with the settled jurisprudence of this Court.

The conflict between the state court's decision and this Court's privacy jurisprudence derives from the state court's failure to appropriately analyze this case as one implicating the fundamental right to privacy, specifically the right to reproductive freedom. Because the challenged probation condition ("no-procreation condition") ties Petitioner's right to have children to his financial status, and because his ability to comply with the condition may rest upon his sexual partner's decision whether to have an abortion should she become pregnant, this case clearly implicates federal constitutional privacy protections. Yet, the Wisconsin court's examination of the condition under rational basis scrutiny, and its approval of the measure as a means for achieving the State's articulated interests, is in direct conflict with this Court's strict scrutiny of other government infringements on the right to procreate. Should it stand, the state court decision will vastly increase state control of private reproductive decisions, with particularly harsh effect on low-income and poor persons, as well as those seeking to emerge from the criminal justice system. Moreover, the decision will open the door to potential state-sponsored population control.

Accordingly, *amici* respectfully urge this Court to grant a *writ of certiorari* to clarify this important federal

question, decided by the state court in conflict with this Court's precedent. *See Skinner v. State of Oklahoma*, 316 U.S. 535, 536 (1942) (granting *certiorari* because interference with the right to have children raises "grave and substantial constitutional questions").

ARGUMENT

I. THE WISCONSIN SUPREME COURT'S DECISION CONCERNS THE IMPORTANT FEDERAL QUESTION OF A STATE'S ABILITY TO INTERFERE WITH THE FUNDAMENTAL RIGHT TO PROCREATE

A. This Court Has Long-Recognized That The Right To Privacy, Specifically The Right To Procreate, Warrants Constitutional Protection From Undue Governmental Intrusion

That reproductive decisions are insulated from unnecessary government control is a bedrock principle of this Court's privacy jurisprudence: "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972) (emphasis omitted). Indeed, "[m]arriage and procreation are fundamental to the very existence and survival of the [human] race." *Skinner*, 316 U.S. at 541. These decisions are at the "very heart of [the] cluster of constitutionally protected choices." *Carey v. Population Servs., Int'l*, 431 U.S. 678, 685 (1977). *See also Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 857 (1992) (noting the Court's long-standing recognition of women's liberty

interest, including the interest in "decisions about whether or not to beget or bear a child").

This Court has accordingly refused to allow unjustified state intrusions into the right to make personal decisions implicating family relations and reproductive choices, repeatedly recognizing that decisions of whether to "accomplish or to prevent conception are among the most private and sensitive." *Carey*, 431 U.S. at 685. *See also Casey*, 505 U.S. at 833 (invalidating conditions which impose an undue burden on the ability to obtain an abortion); *Eisenstadt*, 405 U.S. at 438 (holding unconstitutional a statute prohibiting distribution of contraceptives to unmarried persons); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding unconstitutional a statute prohibiting the use of contraceptives by married couples); *Skinner*, 316 U.S. at 535 (holding unconstitutional a statute requiring sterilization of certain convicted criminals). This privacy jurisprudence establishes that decisions implicating the fundamental right to privacy pose important federal questions deserving this Court's consideration.

B. The Challenged Probation Condition Significantly Infringes On The Right To Make Procreative Decisions Free From Government Control

The no-procreation condition, which prohibits Petitioner from fathering a child unless he proves his financial ability to support his children, violates the constellation of fundamental privacy rights described above. As the dissenting Justices of the Wisconsin Supreme Court recognized, the challenged probation condition works an untenable encroachment on these rights by forbidding Petitioner to "father[ ] another child until he can first establish the

financial ability to support his children." *State v. Oakley*, 629 N.W. 2d 200, 217 (Wis. 2001) (Bradley, J., dissenting). *See also id.* at 221 (Sykes, J., dissenting). Thus, Petitioner is subject to imprisonment should he father another child without advance permission from the State. As Justice Bradley noted, "the order is essentially a prohibition on the right to have children," as the court imposing the probation condition recognized that Petitioner would, in all likelihood, never satisfy the financial requirement it was imposing. *Id.* at 217 (Bradley, J., dissenting).

Given Petitioner's financial inability, then, the no-procreation condition hinges Petitioner's continued freedom from incarceration upon (1) the decision of his sexual partner to have an abortion should she become pregnant; or (2) his own actions to wholly eliminate the possibility of procreation, either through sterilization or complete abstinence from sexual intercourse. Either is untenable from a constitutional standpoint. First, because the probation condition is violated only upon the birth of a child fathered by Petitioner which he cannot financially support, should his sexual partner become pregnant, the only way in which Petitioner avoids prison is if his partner has an abortion. The decision of whether his sexual partner terminates a pregnancy, however, is appropriately a decision over which this male Petitioner ultimately has no control. *See Casey*, 505 U.S. at 897-98; *Danforth v. Planned Parenthood of Central Missouri*, 428 U.S. 52, 69-71 (1976). Punishing Petitioner for a decision that is his partner's alone – the decision whether or not to have an abortion – is patently unfair, an injustice magnified by the fact that a pregnancy may result despite Petitioner's best

effort to prevent pregnancy.[2] Moreover, by tying Petitioner's incarceration to his sexual partner's decision whether to carry a pregnancy to term, the no-procreation condition directly burdens his partner's privacy rights, thus fostering state-coerced abortion. *See Oakley*, 629 N.W. 2d at 219 (Bradley, J., dissenting) (citing *People v. Pointer*, 199 Cal. Rptr. 357 (Cal. App. 1984)). *See also State v. Mosburg*, 768 P.2d 313, 315 (Kan. App. 1989) (noting that condition on probation prohibiting pregnancy would force defendant to "choose among concealing her pregnancy . . . , abortion, or incarceration"). *Cf. Little v. Streater*, 452 U.S. 1, 9-10 (1981) (treating state's exertion of financial pressure on female plaintiff to pursue a paternity action against a putative father as tantamount to state pursuit of the action against the father).

Petitioner can only truly ensure that he prevents pregnancy and remains in full compliance with the probation condition by refraining from having sexual

---

[2] *See Bearden v. Georgia*, 461 U.S. 660, 668-69 (1983) (recognizing that it is "fundamentally unfair" to revoke probation and impose incarceration when the probationer has made "all reasonable efforts" to comply with the probation condition and yet cannot do so "through no fault of his own," and when there are "adequate alternative methods of punishing the defendant" available). The *Bearden* Court considered revocation of a defendant's probation for failure to pay a fine and make restitution, distinguishing that case from situations in which a probationer's inability to comply with a term of probation posed a threat to the safety or welfare of society, for example, by requiring a probationer to refrain from driving while intoxicated. *Id.* at 669 n.9. Having a child, like indigency, "is itself no threat to the safety or welfare of society," *id.*, but rather procreation has been recognized by this court as fundamental to the very survival and existence of humankind. *Skinner*, 316 U.S. at 541. Thus, revoking Petitioner's probation because his partner has a child as the result of an unintended pregnancy would be fundamentally unfair.

intercourse entirely, or by being sterilized.[3] The requirement of abstinence as a condition of probation, as well as the requirement that a probationer be sterilized, is simply inconsistent with this Court's privacy jurisprudence. *See generally Casey*, 505 U.S. at 851; *Skinner*, 316 U.S. at 541. Thus, there is no way in which Petitioner can comply with the no-procreation condition without suffering a significant intrusion into the most intimate and highly personal aspects of his life.

The Wisconsin court decision not only conflicts with the numerous other court decisions recognizing that conditions on probation which implicate a probationer's right to have children unquestionably infringe upon the right to privacy, *see* Petition for a *Writ of Certiorari*, at 19-20, but its attempt to distinguish the no-procreation condition from these types of restrictions conflict with this Court's precedent as well. Specifically, this Court has rejected the argument, accepted by the Wisconsin Supreme Court, *Oakley*, 629 N.W. 2d at 212, that a financial condition does not interfere with a fundamental right, here the right to have children, so long as an individual is allowed to exercise the fundamental right upon a showing of financial ability. In *Zablocki v. Redhail*, 434 U.S. 374

---

[3] Male birth control is not 100% effective. For example, male latex condoms have an 86% effectiveness rate. Female contraception is typically not detectable, and, thus, Petitioner cannot be positive that his sexual partner is using birth control. Even where she does use contraception, however, many forms of female contraception, too, are not 100% effective. For example, diaphragms with spermicide have an 80% effectiveness rate, and oral contraceptives have a 95% effectiveness rate. *See* Tamar Nordenberg, U.S. Food and Drug Admin., *Protecting Against Unintended Pregnancy: A Guide to Contraceptive Choices* (June 2000) <http://www.fda.gov/fdac/features/1997/397_baby.html>.

(1978), the Court addressed the constitutionality of a Wisconsin statute that prohibited a state resident from marrying without court approval when the individual had minor children not in his or her custody that he or she was under court order to support. The Court noted that some individuals in the affected class will never be able to obtain the required court order allowing them to marry, "because they either lack the financial means to meet their support obligations or cannot prove that their children will not become public charges." *Id.* at 387. Thus, these individuals were "absolutely prevented" from marrying. *Id.* So, too, here, as the court imposing the condition recognized that Petitioner will likely never be able to make the showing of financial ability required before Petitioner is allowed to have additional children. *See Oakley*, 629 N.W. 2d at 217. Moreover, even were Petitioner somehow able to meet the no-procreation condition, this Court has nevertheless held such a requirement to be a "serious intrusion" into the fundamental right to privacy. *Zablocki*, 434 U.S. at 387.[4]

Accordingly, the challenged probation condition, which ties Petitioner's right to have children to his financial ability and which is deemed violated upon the birth of a child which he fathers but cannot financially support, is a significant infringement on the fundamental right to privacy long-protected by this Court. The Wisconsin

[4] The Wisconsin court attempts to distinguish this case from *Zablocki* on the basis that *Zablocki* examined the constitutionality of a statutory classification, while this case concerns a condition imposed pursuant to a judge's discretion. *Oakley*, 629 N.W. 2d at 207-8, n.23. This justification, however, ignores this Court's concerns in *Troxel v. Granville*, 530 U.S. 57 (2000), that allowing broad judicial discretion in the privacy context raises significant concerns, as well. *Id.* at 67.

Supreme Court's failure to recognize this infringement flies in the face of this Court's privacy jurisprudence, and *amici* respectfully urge the Court to grant *certiorari* on this basis.

II. THE WISCONSIN SUPREME COURT'S DECISION UPHOLDING THE CHALLENGED PROBATION PROVISION ON THE BASIS THAT IT IS BOTH REASONABLY RELATED TO A LEGITIMATE INTEREST AND IS NARROWLY TAILORED TO ACHIEVE A COMPELLING INTEREST CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT

In upholding the challenged probation condition, the Wisconsin Supreme Court purported to apply rational basis scrutiny, asserting that probation conditions are always subject to a standard of reasonableness even when they infringe upon a constitutional right. *Oakley*, 629 N.W. 2d at 207-10. Nevertheless, the court also held that the probation condition is narrowly tailored to the State's interests in having parents support their children and in rehabilitating Petitioner through probation rather than prison. *Id.* at 212. Both the Wisconsin Supreme Court's application of rational basis scrutiny and its assertion that the probation condition passes muster under strict scrutiny are in direct conflict with this Court's privacy jurisprudence.

A. Because The Probation Condition Imposes A Significant Infringement On The Right To Procreate, The Wisconsin Supreme Court Erred In Requiring The Condition To Pass Only Rational Basis Review

Consistent with its protection of the fundamental right to privacy in reproductive choice, this Court has long held that infringements on the right to procreate are subject to strict scrutiny. As this Court noted in *Carey*, "where a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests." 431 U.S. at 686. *See also Skinner*, 316 U.S. at 541 (extending strict scrutiny to sterilization law because of the law's interference with the right to procreate). A direct burden on the right, such as that at issue here, is equivalent to a flat prohibition on the right for purposes of triggering strict scrutiny. *Carey*, 431 U.S. at 688. As Petitioner explains in his Petition for *Writ of Certiorari*, this Court recently made clear in *United States v. Knights*, 534 U.S. 112 (2001), that the standard does not change when the issue is whether a condition of probation infringes the right. *See* Petition for a *Writ of Certiorari*, at 12-18. Rather, when a federal constitutional right – here, the right to procreate – is infringed by a probation condition, the appropriate constitutional analysis still applies, simply informed by the defendant's probationer status. *See id.*

Here, too, strict scrutiny is necessary to guard against an infringement on the right to procreate. As shown *supra*, the challenged probation condition clearly and significantly interferes with Petitioner's right to procreate. Because the state court refused to apply heightened

review, *Oakley*, 629 N.W. 2d at 207-10, its decision contravenes this Court's clear pronouncements on the issue. *Amici* respectfully urge the Court to grant *certiorari* to clarify courts' obligation to subject such conditions to searching review.

B. The No-Procreation Condition Is Not Narrowly Tailored To Serve A Compelling Interest

Though refusing to subject the no-procreation condition to searching review, the Wisconsin Supreme Court nevertheless opined that the provision was, in fact, narrowly tailored to the State's interest in having parents support their children and in rehabilitating Petitioner through probation rather than prison. *Id.* at 212-13. This, too, conflicts with this Court's determination that conditions, like the one challenged here, fail strict scrutiny. Specifically, the Wisconsin Supreme Court's ruling directly conflicts with this Court's decision in *Zablocki*, 434 U.S. at 374, in which it held that a State could further legitimate interests, similar to those asserted here by the state, through numerous less intrusive alternative means.

In *Zablocki*, the state's asserted interests in prohibiting a state resident from marrying without court approval when the individual had minor children not in his or her custody that he or she was under court order to support included: (1) providing the opportunity to counsel individuals as to the necessity of fulfilling their child support obligations; and (2) otherwise protecting the welfare of out-of-custody children. *Id.* at 388. As this Court noted, however, there were other alternatives that would have vindicated these interests without unduly interfering with the petitioner's and his future sexual partner's fundamental rights. These alternatives included wage assignments,

civil contempt proceedings, and criminal penalties. *Id.* at 389-90. Significantly, and in contrast to less constitutionally suspect alternatives, the imposed condition would not have financially benefited his children, as was intended. *Id.* Furthermore, this Court noted that the prohibition on marriage was underinclusive, as it would not have prohibited the individual from accruing other debts. *Id.* at 390.

Likewise, the no-procreation condition is not narrowly tailored. Here, as in *Zablocki*, the condition is grossly underinclusive, as it "do[es] not limit in any way new financial commitments by the [petitioner] other than those arising" out of the birth of another child. *Id.* And, as in *Zablocki*, there are numerous other means available to ensure that Petitioner meets his financial obligations to his children. For example, as dissenting Justice Bradley noted, Wisconsin's law still provides for wage assignments, civil contempt proceedings, and criminal penalties. *Oakley*, 629 N.W. 2d at 218 (Bradley, J., dissenting). *See also* Wisc. Stat. Ann. §108.13(4)(c) (2001) (allowing for set off of unemployment insurance for payment of past due child support); Wisc. Stat. Ann. §767.303 (2001) (allowing for suspension of vehicle operating privileges when license holder is delinquent in child support payments); Wisc. Stat. Ann. §49.227 (2001) (allowing for publication of names and photographs of child support obligors); Wisc. Stat. Ann. §49.854 (2001) (allowing for liens against real and personal property as means of collecting delinquent child support payments); Wisc. Stat. Ann. §767.265 (2001) (allowing for wage assignments against child support obligors). *See also Bearden*, 461 U.S. at 670-72 (noting that courts have various means of exacting fines from indigent criminal defendants); *United States v. Smith*, 972 F.2d. 960, 962 (8th Cir. 1992) (recognizing that imposing a prison term for violating a condition of probation that prohibits defendant from fathering more children would be

counter productive to the state's interest in having the father support his children). Thus, the no-procreation condition clearly fails the strict scrutiny standard that requires narrowly tailored intrusive state action, and the Wisconsin court erred in stating that the condition meets the requirements of heightened scrutiny.

III. THE WISCONSIN SUPREME COURT'S DECISION WILL HAVE WIDE IMPACT ON THE FUNDAMENTAL PRIVACY RIGHTS OF VULNERABLE POPULATIONS AND MAY ENCOURAGE OPPROBRIOUS POPULATION CONTROL

The Wisconsin Supreme Court's decision threatens the reproductive rights of individuals who are particularly vulnerable to undue government interference. By applying a less exacting standard of review than strict scrutiny, the state court decision erodes this Court's long-standing protection for privacy rights and reproductive freedoms, substantially interfering with "a sensitive and important area of human rights." *Skinner*, 316 U.S. at 536.

Clearly, fathers, including noncustodial fathers, have an obligation to support their children. A number of federal and state laws attempt to facilitate and extract such financial support,[5] and the mechanisms available to the government in its efforts to obtain support payments are numerous, ranging from garnishing wages to

---

[5] *See, e.g.*, 42 U.S.C. §654 (2002); Wisc. Stat. Ann. §49.19(4)(h)1.a. (2001).

rehabilitating delinquent obligors through incarceration.[6] In the instant case, however, the Wisconsin court employed a correctional tool that oversteps the bounds of what states can use as a valid instrument of rehabilitation: restricting individual reproductive freedoms based on economic means. The decision below raises an important federal question with enormous implications for many vulnerable populations, including jeopardizing the reproductive freedoms of individuals with limited economic means as well as those subject to probation and in the process of transitioning back into the community. Moreover, the court's approval of the no-procreation condition opens the door to potential judicial and governmental experimentation with extreme and opprobrious population control.

The Wisconsin Supreme Court's decision upholding the probation condition sanctions an unconstitutional economic means test for parenting and exercising reproductive choice rights, jeopardizing the parenting and privacy rights of low-income individuals. The condition challenged here is an explicit credit check on Petitioner's exercise of the fundamental right to procreate; it prohibits Petitioner from "hav[ing] any more children unless he demonstrates that he ha[s] the ability to support them and that he is supporting the children he already ha[s]."

---

[6] The efficacy of these various policies has been the subject of considerable study and debate. *See* Michelle Ganow Jones, *Child Support Issues in Welfare Reform Reauthorization*, TANF Reauthorization Resources, The Welfare Info. Network (May 2002) <http://www.welfareinfo.org/childsupportissuestanfreauth_trn.htm>; Elaine Sorensen & Helen Oliver, *Policy Reforms are Needed to Increase Child Support from Poor Fathers*, The Urban Inst. (Apr. 2002) <http://www.urban.org/UploadedPDF/410477.pdf>.

Oakley, 629 N.W. 2d at 203.[7] The no-procreation condition's explicit economic means test, if replicated, could have far-reaching consequences, putting the privacy and reproductive choice rights of many other low-income individuals, including welfare recipients and the unemployed, at risk. Indeed, Petitioner's facts are not as "atypical" as the state court majority suggested. *Id.* at 214. There are approximately two and a half million poor noncustodial fathers who do not pay child support.[8] Incarceration, disability, lack of education, high unemployment and limited work history are among the factors that may be beyond an individual's control and that may reduce any parent's earning potential and therefore his or her ability to meet child support obligations.

Additionally, upholding the no-procreation condition jeopardizes the privacy and procreation rights of the thousands of individuals within the jurisdiction of Wisconsin's probation and parole system, and, if adopted in other states, millions nationwide.[9] Accordingly, the decision

---

[7] The condition also rests on a gender-based assumption that Petitioner will be solely responsible for the support of any future children. It prohibits additional children even if the mother would be able to support them independently. Moreover, it ignores the non-economic contributions that a noncustodial father provides for his children.

[8] *See* Elaine Sorensen, The Urban Institute, *Child Support and Fatherhood Proposals: Testimony before the United States House of Representatives, Subcommittee on Human Resources, Committee on Ways and Means* (June 28, 2001) <http://www.urban.org/TESTIMON/Sorensen_06-28-01.html>.

[9] The U.S. Department of Justice reported that in Wisconsin, in the year 2000, approximately 54,000 people were subject to probation, and approximately 9,000 were subject to parole. Over four million

(Continued on following page)

implicates far more than just the privacy rights of Petitioner; it establishes a principle that opens the door to potential government intrusions into the fundamental right to procreate of many others emerging from the criminal justice system.

Moreover, the no-procreation condition reaches beyond Petitioner's interests; it also interferes with the privacy rights of his family, and should the condition be replicated, the families of others like him. As discussed *supra*, because Petitioner will be subject to incarceration if his sexual partner bears his child during his probation period, this criminal sanction also places an undue and substantial burden on his partner and her decision whether or not to bear his child. The legal sanction here is not designed to persuade; it is an obstacle specifically designed to hinder free choice. *See Casey*, 505 U.S. at 877 (plurality opinion) (reviewing provisions of Pennsylvania Abortion Control Act under undue burden analysis). The impact of this criminal sanction on Petitioner's partner in such a case will be substantial. Given their intimate relationship, the threat of her partner's incarceration will unduly burden her decision.[10] Additionally, pressure that a probationer,

---

individuals were either on probation or parole nationally in 2000 (3,839,532 on probation and 725,527 on parole). *See* U.S. Dep't of Justice, *Nat'l Correctional Population Reaches New High, Grows by 126,400 during 2000 to Total 6.5 Million Adults* (Aug. 28, 2001) <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppus00.pdf>.

[10] Incarcerating a woman's partner or husband, as a consequence of her decision whether or not to bear his child, clearly burdens her decision and amounts to government coercion. Married or not, her intentions regarding her pregnancy will be substantially encumbered by the additional consequence of her partner's incarceration. Recent reports from the Fragile Families and Child Wellbeing Study conducted by Princeton and Columbia Universities indicate that the vast majority

(Continued on following page)

who is subject to imprisonment should his partner bear his child, might place upon his partner regarding the pregnancy would be directly attributable to the state and would constitute an unconstitutional burden. *Cf. Casey*, 505 U.S. at 897 (finding that state-created risks of private cajoling and violence by the man imposed undue burden on the woman). Because Petitioner's partner may not be in a position to challenge the condition, as she is not the one subject to incarceration, Petitioner's present challenge to the no-procreation condition also protects his partner's reproductive choice rights. *Cf. Powers v. Ohio*, 499 U.S. 400 (1991) (recognizing the rights of litigants to bring actions on behalf of third parties in case where non-minority criminal defendant asserted equal protection rights of minority jurors); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (according standing to private schools asserting the privacy and parenting rights of parents who would be subject to prosecution for sending their children to private school).

Moreover, the state court decision permits a form of government administered population control. Notwithstanding *Buck v. Bell*, 274 U.S. 200 (1927),[11] this Court has

---

of unmarried parents are committed to a relationship with each other and their child at the time the child is born. Sara McLanahan, *et al.*, The Brookings Institution, *Fragile Families, Welfare Reform, and Marriage*, Policy Brief No. 10, 2 (Nov. 2001) <http://www.brook.edu/dybdocroot/wrb/publications/pb/pb10.pdf>. Additionally, 93% of single mothers studied in the Fragile Families and Child Wellbeing Project reported wanting the father involved in raising their child. Brandheim-Thoman Ctr. for Research on Child Wellbeing, *Dispelling Myths About Unmarried Fathers*, Fragile Families Research Brief (May 2000) <http://www.crcw.princeton.edu/CRCW/papers/ researchbrief1.pdf>.

[11] In *Buck v. Bell*, the Court upheld a state statute permitting sterilization of so-called feeble-minded individuals. On May 2, 2002, the

(Continued on following page)

been wary of such government actions. For example, in *Skinner,* this Court expressed its view "that strict scrutiny of the classification which a state makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals." 316 U.S. at 541. Likewise, in *Casey*, the Court articulated a concern regarding the possibility of eugenics: "[i]f indeed the woman's interest in deciding whether to bear and beget a child had not been recognized as in *Roe*, the State might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it, to further asserted state interests in population control, or eugenics, for example." 505 U.S. at 859.

This Court's vigil against population control is informed by this country's significant history of experimentation with eugenic population control,[12] such history which is echoed in the condition ordered by the trial judge below.[13] For example, the "model sterilization law," the

---

seventy-fifth anniversary of the *Buck v. Bell* decision, the State of Virginia formally apologized for the government's role in sterilizing approximately 8000 people under the state's law, which was based on the "model eugenical sterilization law." *See* William Branigin, *Va. Apologizes to the Victims of Sterilizations*, Wash. Post, May 3, 2002, at B1. Carrie Buck was the first person sterilized under the law; research indicates that she was not "feeble-minded," rather she was of normal intelligence, but poor and uneducated. *See* Stephen J. Gould, *The Flamingo's Smile* 306-18 (1985); Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U.L. Rev. 30 (1985).

[12] By 1931, at least thirty states had enacted sterilization laws. *See* Michael Ollove, *The Lessons of Lynchburg*, The Baltimore Sun, May 6, 2001, at 7F; Gould, *supra,* at 307-09.

[13] The trial judge stated: "But seven children . . . that's expensive. . . . And you know and I know you're probably never going to make 75 or 100 thousand dollars a year. You're going to struggle to make 25 or 30. . . . I know that that's going to be tough and I think it should

(Continued on following page)

source for most of the sterilization laws passed in America, including the one at issue in *Buck v. Bell,* also served as the model for the eugenic sterilization program of Nazi Germany.[14] Under the Virginia law at issue in *Buck v. Bell*, many individuals were sterilized who were not "feeble-minded" but rather were indigent and poorly educated, characteristics shared by others at risk of no-procreation conditions similar to Petitioner's, given the principles upheld by the majority below.[15] A history of state sponsored coercive sterilization programs and sterilization abuse of certain populations, including Black, Puerto Rican, Native American, Mexican-American as well as incarcerated women, further demonstrates the need for heightened scrutiny in this case.[16]

The no-procreation condition imposed on Petitioner here, and subject only to rational basis review, then, opens the door to a means of population control that this Court has sought to protect against. While the Wisconsin majority attempted to distinguish petitioner's no-procreation condition from those ordered by judges who impose conditions "that reflect their own idiosyncrasies," the rational basis review inappropriately used by the state court is simply insufficiently stringent to protect individuals from government overreaching. *Oakley,* 629 N.W. 2d at 206.

---

come to an end unless you really can demonstrate that you can support . . . more children." *See* Jan. 13, 1999 Trans. at 30-31.

[14] *See* Gould, *supra*, at 309.

[15] *See* Ollove, *supra,* at 7F.

[16] *See* Rosalind Pollack Petchesky, *Abortion and Woman's Choice* 179-81 (1984); Helen Rodrigues-Triaz, *Sterilization Abuse, in Biological Woman – The Convenient Myth,* 147-51 (Ruth Hubbard *et al.* eds. 1982).

Thus, the ramifications of the Wisconsin Supreme Court's decision affirming the no-procreation probation condition imposed on Petitioner are potentially much more extensive than acknowledged by the state court and significantly jeopardize the privacy and procreation rights of individuals while conflicting with the settled jurisprudence of this Court. For these reasons, *amici* respectfully urge the Court to grant *certiorari* to clarify the important question presented.

CONCLUSION

For the reasons set forth *supra*, and for those set forth in the Petition for *Writ of Certiorari*, *amici* respectfully urge this Court to grant *certiorari* in this case.

Respectfully submitted,

LAWRENCE S. LUSTBERG
Counsel of Record
RISA E. KAUFMAN
GIBBONS, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE
A Professional Corporation
One Riverfront Plaza
Newark, New Jersey 07102-5497
(973) 596-4500

MARTHA F. DAVIS
ILIZABETH GONCHAR HEMPSTEAD
NOW LEGAL DEFENSE AND
EDUCATION FUND
395 Hudson Street, 5th Floor
New York, New York 10014
(212) 925-6635

Dated: July 11, 2002

APPENDIX A:

STATEMENTS OF INTEREST OF INDIVIDUAL *AMICUS CURIAE*

NOW Legal Defense and Education Fund

NOW Legal Defense and Education Fund is a leading national non-profit civil rights organization that has used the power of the law to define and defend women's rights for thirty years. NOW Legal Defense has a long-standing commitment to economic and social justice and to securing reproductive rights for all, regardless of economic means. The NOW Legal Defense Fund's litigation and education docket primarily focuses on the rights of welfare recipients, discrimination in employment and training, the employment and housing rights of victims of violence, and ensuring that the reproductive and marriage choices of women are free from government intrusion.

The National Partnership for Women & Families

The National Partnership for Women & Families, founded as the Women's Legal Defense Fund in 1971, is a non-partisan, non-profit advocacy group that uses public education and advocacy to promote fairness in the workplace, quality health care, and policies that help women and men meet the dual demands of work and family. The National Partnership firmly believes that reproductive choice must never be tied to economic means. The National Partnership has a long history of promoting and defending a woman's right to choose by filing *amicus curiae* briefs on major reproductive rights and health issues.

National Advocates for Pregnant Women

The National Advocates for Pregnant Women (NAPW) is a non-profit organization dedicated to securing the human and civil rights, health and welfare of pregnant and parenting women, and furthering the interests of their families. NAPW seeks to ensure that the fundamental human capacity for procreation is not used by government authorities as a mechanism for controlling or punishing certain individuals or groups. In our view, reproductive decisions cannot be blamed for poverty or other social ills, and we do not believe that government control of such decisions provides the solution to these problems.

Planned Parenthood Federation of America, Inc.

Planned Parenthood Federation of America, Inc. (PPFA), a not-for-profit corporation organized in 1922, is the leading national voluntary health organization in the field of family planning. PPFA has 127 affiliates in 49 states and the District of Columbia, operating approximately 875 health centers. In addition, in many states, Planned Parenthood affiliates have separate organizations that provide them with public affairs and lobbying support at the state level. PPFA is committed to promoting and preserving full reproductive choice for all people, and to providing access to high quality, confidential, reproductive health services.

Center for Reproductive Law & Policy

The Center for Reproductive Law & Policy (CRLP), founded in 1992, is a non-partisan, non-profit group that uses advocacy both domestically and internationally to ensure access to reproductive rights for all people. CRLP

has either represented directly or filed *amicus curiae* briefs in every major case involving reproductive rights and health issues before the United States Supreme Court since 1992.

Choice USA

Choice USA is a national pro-choice organization, which gives emerging leaders the tools they need to organize, network, and exchange ideas to build a youth-centered pro-choice agenda and mobilize communities for reproductive freedom. Choice USA is dedicated to the right of each person worldwide to decide when and if they will have sex, when and if they will be pregnant, and when and if they will have a child. In order to make those personal decisions, accurate information and safe, legal reproductive heath services must be available to everyone.

National Center for Human Rights Education

The National Center for Human Rights Education (NCHRE) is a national training and resource service center for social justice activists in communities and schools. Its mission is to build a human rights movement in the United States by training community leaders and student activists to apply human rights standards to issues of injustice in the United States. NCHRE joins this *amicus* brief because it believes that the decision of the Wisconsin State Supreme court sets a dangerous precedent for government interference in private reproductive decisions.

SisterSong Women of Color Reproductive Health Collective

The SisterSong Women of Color Reproductive Health Collective is a network of local, regional and national grassroots agencies representing four primary ethnic populations/indigenous nations in the United States: Native American/Indigenous, Black/African American, Latina/Puerto Rican, and Asian/Pacific Islander. The Collective was formed in 1997 to educate women of color and policy makers on reproductive and sexual health and rights, and to work towards the access of health services, information and resources that are culturally and linguistically appropriate. We achieve these goals through public policy work, advocacy, service delivery and health education within our communities on the local, national and international levels. As women of color reproductive health organizations, we believe that the Wisconsin Supreme Court erred in granting the state the power to predetermine who should be allowed to reproduce and bear children, and that this decision echoes earlier rationales for race and class-based eugenics popular in the beginning of the 20th century. SisterSong Collective represents many women who have experienced state-directed intervention with our decisions to bear children through sterilization abuse, unsafe medical and clinical trials, and health care disparities.

Women's Economic Agenda Project (WEAP)

The Women's Economic Agenda Project (WEAP) is a nonprofit organization established in 1982 in California by and for low-income women. Our focus is on the elimination of poverty and the creation of economic security for poor women and their families through community organizing,

leadership development, and policy work. WEAP's decades-long policy work against the criminalization of poor people shows our continued commitment to securing economic human rights for every resident of the United States.